No. 06-699

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IN THE

Supreme Court of the United States

DAISY ESTELLE COBB,
Widow of OLIVER RAY GIBBS,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit correctly held that for purposes of bringing suit as a "beneficiary" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), an individual must prove both: (i) a colorable claim for benefits; and (ii) that he was designated as such by a participant or by the terms of an employee benefit plan.

PARTIES TO THE PROCEEDING

Petitioner

Daisy Estelle Cobb ("Ms. Cobb") is the widow of Oliver Ray Gibbs. Prior to his death, Mr. Gibbs was a retired participant of the Central States, Southeast and Southwest Areas Pension Fund.

Respondent

Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan as defined by ERISA, 29 U.S.C. §§ 1002(2)(A) and 1002(37).

CORPORATE DISCLOSURE STATEMENT

Central States does not have a parent corporation and no public company owns stock in Central States.

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PERTINENT STATUTES

29 U.S.C §§ 1002(7) & (8) provide as follows:

For purposes of this subchapter:

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

> (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

29 U.S.C. § 1132(a) provides, in pertinent part, as follows:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

STATEMENT OF THE CASE

A. The Trustees' Denial Of Ms. Cobb's Claim.

Oliver Ray Gibbs ("Mr. Gibbs") was a participant of Central States. In August of 1979, Mr. Gibbs submitted an Application For A Retirement Pension Benefit (the "Pension Application") to Central States stating that he was retiring on October 26, 1979. (RE 34-35; RE 9, ¶¶ 24 & 25 [R. 166, ¶¶ 24 & 25].)[1] At the time he submitted his application, Mr. Gibbs was married to, but separated for 13 years from, Ms. Cobb. (RE 32; RE 8, ¶ 22 [R. 165, ¶ 22].) Although Ms. Cobb was still alive, Mr. Gibbs represented under oath that his spouse was "deceased" in his Pension Application. (RE 34-35; RE 9, ¶¶ 25 & 26 [R. 166, ¶¶ 25 & 26].)

When he retired, Mr. Gibbs was eligible to receive an unreduced pension of $675.00 per month for the rest of his

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[1] "RE __" refers to Appellee's Record Excerpts and "R. __" refers to the "USCA5 __" pagination used for the record on appeal in the Fifth Circuit.

life. (RE 33, 25 & 24; RE 9-10, ¶¶ 28-30 [R. 166-67, ¶¶ 28-30].) Central States' Pension Plan also allowed an eligible participant to receive or reject the Joint and Survivor Pension Benefit (hereinafter referred to as the "JSO"). (RE 17 & 21; RE 4, ¶ 16 [R. 161, ¶ 16].) Generally, this benefit provides a reduced pension to the participant, and 50% of the reduced lifetime pension as a lifetime monthly income to his/her spouse after the participant's death. (RE 18; RE 4-5, ¶ 17 [R. 161-62, ¶ 17].) In Mr. Gibbs' case, if the JSO had been elected, he would have received a reduced lifetime pension of $588.60 per month, instead of his full pension of $675.00 per month. (RE 24; RE 10, ¶ 30 [R. 167, ¶ 30].) By representing that his spouse was "deceased," Mr. Gibbs became ineligible for the JSO and effectively rejected the benefit.[2]

After Mr. Gibbs' application was processed by Central States, he received a letter advising that his Pension Application had been approved. (RE 33; RE 9, ¶ 28 [R. 166, ¶ 28].) The letter advised that he would receive a pension benefit of $675.00 per month effective November 1, 1979. (RE 33; RE 9, ¶ 28 [R. 166, ¶ 28].) The letter also indicated that in the event of his death, no JSO would be paid to his spouse. (RE 33; RE 9, ¶ 28 [R. 166, ¶ 28].) Thereafter, Mr. Gibbs began to receive an unreduced pension of $675.00 per month from November of 1979. (RE 25; RE 10, ¶ 29 [R. 167, ¶ 29].) Mr. Gibbs died from lung cancer on October 31, 1985, and his pension benefits ended at that time. (RE 25 & 29; RE 10, ¶¶ 29 & 31 [R. 167, ¶¶ 29 & 31].)

In February of 1981 (prior to Mr. Gibbs' death), Ms. Cobb contacted Central States via a letter. In the letter, Ms. Cobb advised (contrary to Mr. Gibbs' sworn declaration) that she was Mr. Gibbs' spouse. (RE 32; RE 10, ¶ 32 [R. 167, ¶ 32].)

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[2] It is unclear why Mr. Gibbs represented that his spouse was deceased. The law, at that time, gave him sole discretion to accept or reject the JSO. *Boggs v. Boggs*, 520 U.S. 833, 843, 117 S.Ct. 1754 (1997).

Ms. Cobb stated that she and Mr. Gibbs had been separated for "about 15 years" but that they were still legally married. (RE 32; RE 10, ¶ 32 [R. 167, ¶ 32].) Ms. Cobb also stated that Mr. Gibbs was receiving a pension benefit and that she wanted to receive some of the pension benefits because "I won't [sic] what is mine." (RE 32; RE 10, ¶ 32 [R. 167, ¶ 32].) Central States responded to that letter by advising Ms. Cobb that she was not eligible to receive any part of Mr. Gibbs' pension benefit because the Pension Plan provided that "[a]ll Pension Benefits provided by this Plan shall be paid directly to the Pensioner, and not to any creditor or other person not eligible for such benefits." (RE 31; RE 10, ¶ 33 [R. 167, ¶ 33].)

In 2002, nearly 17 years after Mr. Gibbs' death, and about 21 years after Ms. Cobb first raised the issue with Central States, Ms. Cobb, through her attorney, requested benefits from Central States as a result of Mr. Gibbs' death by submitting an Application For Death Benefit. (RE 30; RE 10-11, ¶ 34 [R. 167-68, ¶ 34].) In a letter dated September 6, 2002, Central States advised Ms. Cobb that she was not eligible to receive any benefits because Mr. Gibbs did not elect the JSO when he retired in 1979. (RE 11, ¶ 35 [R. 168, ¶ 35].)

Pursuant to Central States' appeals process, Ms. Cobb appealed the denial of her claim. Ms. Cobb exhausted her administrative appeals by taking her claim before Central States' Board of Trustees. On December 9, 2003, the Trustees reviewed all of the information contained in the administrative record and rejected Ms. Cobb's appeal. The Trustees determined that "the communications, acts and omissions by the late Oliver Ray Gibbs, at and around the time of his 1978 [sic] retirement, induced the Pension Fund to rely, and the Pension Fund did in fact actually and reasonably rely, upon his intention to reject the JSO." (RE 27; RE 11-12, ¶ 39 [R. 168-69, ¶ 39].)

B. The District Court Held That The Trustees' Decision Was Reasonable.

On May 18, 2004, Ms. Cobb filed suit in the Eastern District of Louisiana under ERISA, 29 U.S.C. § 1132(a)(1)(B), seeking to overturn the denial of her claim. Although Ms. Cobb presented numerous arguments in the District Court, her main arguments were: (i) since Mr. Gibbs never signed an election form rejecting the JSO, she was entitled to the JSO under the terms of the Pension Plan; and (ii) Central States was obligated to unilaterally reduce Mr. Gibbs' pension to provide for the JSO once it discovered that Ms. Cobb was still alive.

The District Court reviewed the Pension Plan and Central States' Trust Agreement and held that the documents conferred the Trustees with discretionary authority to determine eligibility of benefits. Accordingly, the District Court reviewed the Trustees' denial of Ms. Cobb's claim under the abuse of discretion standard. After reviewing the administrative record and the terms of the Pension Plan, the District Court concluded that Ms. Cobb was not entitled to the JSO. Specifically, the Court held that there was "no doubt" that Mr. Gibbs "did not want to give his wife any survivor's benefit." (RE 39 [R. 387].) After rejecting Ms. Cobb's remaining arguments, the District Court upheld the Trustees' decision, entered summary judgment for Central States, and entered judgment dismissing the complaint and the action asserted thereby.

C. The Fifth Circuit Held That There Was No Subject-Matter Jurisdiction And Vacated The District Court's Decision.

Ms. Cobb appealed the District Court's decision to the Fifth Circuit and presented the same main arguments. The court addressed jurisdiction first and noted that it was required to interpret the terms of the Pension Plan at the "jurisdictional stage" to judge the issue of Ms. Cobb's

standing, *i.e.*, whether she met the definition of "beneficiary." *Cobb v. Central States, S.E. & S.W. Areas Pension Fund*, 461 F.3d 632, 637 (5th Cir. 2006).The Fifth Circuit then proceeded to review the Pension Plan and administrative record and concluded that Mr. Gibbs had rendered himself ineligible for the JSO by representing that his spouse was deceased. *Id.* at 638 n.7. Moreover, the Fifth Circuit determined that Mr. Gibbs had rejected the JSO *de facto* and that even if he misrepresented that his wife was deceased, it was harmless because he was entitled to reject the JSO without the consent of his spouse. *Id.* at 638. Despite concluding that Ms. Cobb was not entitled to the JSO, the Fifth Circuit decided to vacate the District Court's decision due to a lack of subject-matter jurisdiction. The court held that Ms. Cobb did not have standing to sue as a "beneficiary" under § 1132(a), because she was never designated by Mr. Gibbs, or the terms of the plan, to receive benefits.[3] Accordingly, the Fifth Circuit remanded the matter with instructions to dismiss the complaint for want of subject-matter jurisdiction.

REASONS FOR DENYING THE PETITION

A. There Is No Compelling Reason To Grant Ms. Cobb's Petition.

Ever since this Court's decision in *Lau Ow Bew*, 141 U.S. 583, 12 S.Ct. 43 (1891), this Court has exercised great restraint in granting certiorari. The power has been sparingly used and reserved for cases of "peculiar gravity and general importance" or "to secure uniformity of decision." *American Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 383, 13 S.Ct. 758 (1893). Ms. Cobb's case satisfies neither requirement and satisfies none of the "compelling reasons"

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[3] All statutory citations contained in this brief refer to "29 U.S.C. § ___" unless indicated otherwise.

listed in Supreme Court Rule 10. There is no conflict between the circuit courts on any issue raised by Ms. Cobb. Moreover, no important federal question was decided in a way which conflicts with decisions from this Court.

Ms. Cobb's case turned on the Fifth Circuit's application of the individual facts involved to a statement of the law that is consistent with the plain text of ERISA and decisions of other circuit courts. Accordingly, it is unlikely that the Fifth Circuit's decision will have a lasting impact on anyone other than Ms. Cobb. Admittedly, the case, like any other case, is important to the individual involved. However, that is not a compelling reason to grant certiorari. Granting Ms. Cobb's petition will not "secure uniformity of decision" since there is no split of authority among the circuit courts regarding the issue involved and no important question of federal law has been decided by the Fifth Circuit which conflicts with decisions from this Court. Accordingly, Ms. Cobb's petition should be denied.

B. Determining Whether Ms. Cobb Proved That Mr. Gibbs Misrepresented His Marital Status Is Not Grounds For Granting Certiorari.

In the proceedings below, Ms. Cobb argued that Central States should have unilaterally reduced Ms. Gibbs' pension and forced him to take the JSO benefit because he misrepresented that his wife was deceased. In addressing this argument, the Fifth Circuit, in a footnote, stated that Ms. Cobb had failed to prove that Mr. Gibbs had made a knowing misrepresentation. *Cobb*, 461 F.3d at 638 n.8. Relying solely on this statement, Ms. Cobb argues that the court failed to review the entire record and therefore requests review. However, the Fifth Circuit's observation, whether correct or not, was completely irrelevant to the court's decision.

The basis of the Fifth Circuit's decision was the lack of subject-matter jurisdiction. Although the court touched upon

the merits of the case in ruling on jurisdiction, a determination of whether Mr. Gibbs had knowingly misrepresented his marital status was unimportant to the court's holding. Indeed, for purposes of addressing Ms. Cobb's argument, the Fifth Circuit gave her the benefit of the doubt and assumed that Mr. Gibbs *had* knowingly misrepresented that his wife was deceased. *Id.* at 638. However, as stated by the court, his misrepresentation was "harmless" because, at that time, the law allowed Mr. Gibbs to select an unreduced pension without the consent of his spouse. *Id.* at 638. Thus, determining whether Ms. Cobb proved that Mr. Gibbs misrepresented his martial status is not grounds for granting certiorari.

C. The Fifth Circuit's Decision Is Consistent With The Plain Text Of ERISA And The Decisions Of The Ninth, Third, and Seventh Circuits.

The Fifth Circuit held that to maintain a suit as a "beneficiary" under § 1132(a), an individual must prove both: (i) a colorable claim for benefits; and (ii) that he was designated as such by a participant or by the terms of an employee benefit plan. *Cobb*, 461 F.3d at 636. In her Petition, Ms. Cobb takes issue with the latter requirement and argues that by requiring a "designation," the Fifth Circuit's decision conflicts with those of the Ninth, Third, and Seventh Circuits. Ms. Cobb is wrong.

Since ERISA provides a definition of the term "beneficiary," the first place to look is the text of the statute. *U.S. v. Alvarez-Sanchez*, 511 U.S. 350, 356, 114 S.Ct. 1599 (1994). ERISA defines "beneficiary" as "a person *designated* by a participant, or by the terms of any employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8) (emphasis added). Thus, the Fifth Circuit's "designation" requirement is clearly consistent with the plain text of ERISA.

Ms. Cobb argues that the Fifth Circuit's decision conflicts with the Ninth Circuit. Although her Petition fails to state which cases conflict, Ms. Cobb seems to be arguing that *Cobb* conflicts with *Fentron Indus., Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982). In *Fentron*, the Ninth Circuit addressed whether an employer had standing to sue under § 1132. Although the court noted that "employers" were not one of the groups empowered to sue under § 1132, it held that section's list of potential plaintiffs was not exclusive. *Id.* at 1305. The court then held that Fentron (an employer) had standing to sue because its alleged injuries fell within the "zone of interests" protected by ERISA. *Id.* at 1304-05.

It is questionable whether *Fentron* remains good law. Indeed, the Ninth Circuit itself has admitted that the "[t]he reasoning of *Fentron* has twice been repudiated by the Supreme Court" and that the case "has also been uniformly rejected by other circuits and by commentators." *Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261, 1265, n.3 (9th Cir. 1992)(citations omitted). Moreover, cases post-*Fentron* clearly show that the Fifth Circuit's decision in *Cobb* is in-line with the Ninth Circuit. For example, in *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990), the court considered whether plaintiffs had standing to sue as beneficiaries under § 1132(a). As the Fifth Circuit did in *Cobb*, the Ninth Circuit looked to the definition contained in § 1002(8) and analyzed whether plaintiffs had been "designated" as beneficiaries. *See also Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404, 408 (9th Cir. 1995)(holding that to be a beneficiary, an individual must be designated by a participant or the terms of the plan), *cert. denied*, 516 U.S. 942, 116 S.Ct. 377 (1995); *Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023, 1027 n.2 (9th Cir. 1995)(noting designation requirement in determining beneficiary status).

Ms. Cobb also argues that *Cobb* conflicts with case law from the Third Circuit. Although Ms. Cobb's Petition again fails to state which cases conflict, she is presumably relying on the Third Circuit's decision in *Northeast Department ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985).[4] In *ILGWU*, the Third Circuit addressed whether certain plaintiffs had standing to sue under § 1132(a). In the opinion, the court referred to *Fentron* for its "zone of interests" analysis. However, in the end, the Third Circuit rejected *Fentron* and elected to read § 1132(a) "narrowly and literally." *Id.* at 153. Accordingly, rather than supporting Ms. Cobb's Petition, *ILGWU* actually supports the denial of her Petition. Additionally, cases decided after *ILGWU* show that *Cobb* is in-line with the Third Circuit. *See, e.g., Wolk v. UNUM Life Ins. of America*, 186 F.3d 352, 356 (3d Cir. 1999)(court holding that to be a beneficiary, an individual must be designated by a participant or the terms of the plan), *cert. denied*, 528 U.S. 1076, 120 S.Ct. 792 (2000).

Ms. Cobb further argues that *Cobb* conflicts with the Seventh Circuit's decision in *Sladek v. Bell System Management Pension Plan*, 880 F.2d 972 (7th Cir. 1989). In *Sladek*, the wife of a pension plan participant filed suit as a beneficiary under § 1132(a) to set aside her husband's pension election due to his alleged incompetency. The court held that the wife had standing as a potential beneficiary even though she had not been designated as such by her husband. *Id.* at 978-79. Crucial to its holding was that the election may be voidable and that if the election was not valid due to the husband's incompetency, the wife would have been a beneficiary under the terms of the plan. *Id.* at 976-79.

As correctly noted by the Fifth Circuit in its analysis, *Sladek* is inapposite. In *Sladek*, the husband's pension

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[4] This is the only Third Circuit case cited in the Petition.

election was voidable because he was allegedly incompetent when he made the election. If the election was set aside, the terms of the plan would have designated the wife as a beneficiary. In contrast, here, Mr. Gibbs' *de facto* election (he said his wife was dead) is not voidable even if he misrepresented that Ms. Cobb was deceased because he had the right to reject the JSO without her consent. *Cobb*, 461 F.3d at 638.

Lastly, it is important to note that in its analysis, the Fifth Circuit assumed for argument's sake that Ms. Cobb *had* been "designated" as a beneficiary. *Id.* at 636. Nonetheless, under the facts of the case, the court held that Ms. Cobb's claim must still be rejected because Mr. Gibbs had received an unreduced lifetime pension and "[u]nder the plan, no pension benefits are to be paid to surviving spouses of those who received benefits under the unreduced Lifetime Benefit option." *Id.* at 637. Accordingly, in the opinion of the Fifth Circuit, even if Ms. Cobb satisfied the "designation" requirement, she would still not be entitled to the JSO. For this reason, even if Ms. Cobb had succeeded in demonstrating a palpable split among the circuit courts on the jurisdictional issue, this case would be a particularly poor vehicle for resolving that split. The issue should be resolved in the context of a case in which some realistic doubt remains as to the outcome on the merits. Here, it is clear how the Fifth Circuit would rule on the merits. Thus, given the unique circumstances of this case, the argument concerning "jurisdiction" would, as a practical matter, be moot; the ultimate outcome for Ms. Cobb would be the same even if she succeeded in achieving a remand to the Fifth Circuit.

In summary, the Fifth Circuit held that to qualify as a "beneficiary" under § 1132(a), an individual must prove both: (i) a colorable claim for benefits; and (ii) that he was designated as such by a participant or by the terms of the plan. The Fifth Circuit's decision is consistent with the plain

text of ERISA, and the decisions of the Ninth, Third, and Seventh Circuits. Accordingly, Ms. Cobb's Petition should be denied.

D. The Fifth Circuit's Decision Is Consistent With This Court's Decision In *Firestone*.

Lastly, Ms. Cobb argues that *Cobb* conflicts with this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948 (1989). In *Firestone*, this Court was asked to determine who could qualify as a "participant" for purposes of § 1132. Focusing on the fact that ERISA defined "participant" to include any individual who "may become eligible" for benefits, the Court held that the term included anyone who has a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future . . ." *Id.* at 117-18.

Although instructive, *Firestone* is not directly on point because that case involved the definition of "participant"—not "beneficiary." *Id.* at 117-18. The term "beneficiary," similar to the term "participant," includes any individual who "may become entitled" to benefits. 29 U.S.C. § 1002(8). However, as correctly noted by the Fifth Circuit, "the definition of beneficiary additionally requires something that the definition of participant does not: that the 'beneficiary' be 'designated' as such by the participant or by the terms of the plan." *Cobb*, 461 F.3d at 635. Accordingly, under *Firestone* and the plain text of § 1002(8), the Fifth Circuit correctly held that a beneficiary must prove both a colorable claim and a designation.[5]

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[5] In the Fifth Circuit, Central States assumed that Ms. Cobb satisfied the "designation" requirement because she was claiming the JSO as the spouse of a participant. Accordingly, in arguing that Ms. Cobb qualified as a beneficiary, Central States focused solely on whether Ms. Cobb had a colorable claim for benefits.

CONCLUSION

Traditionally, this Court has reserved its certiorari power for cases of "peculiar gravity and general importance" or "to secure uniformity of decision." The Fifth Circuit's decision will not have a lasting impact on anyone other than Ms. Cobb. Additionally, there is no split of authority among the circuit courts and no important federal question was wrongly decided. Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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